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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

SHELLY JEAN SLIGHTOM,

Defendant and Appellant.

C037053

(Super. Ct. No. CM013005)

Defendant Shelly Jean Slightom was convicted by a jury of involuntary manslaughter with personal use of a firearm, as a lesser included offense of murder.¹ She was sentenced to the midterm of three years for involuntary manslaughter, and the aggravated term of 10 years for using a firearm. Defendant appeals, arguing: (1) imposition of sentence for firearm use violated the statutory proscription on multiple punishment;

¹ Penal Code sections 192, subdivision (b), 12022.5, subdivision (a)(1), 187. Undesignated section references are to the Penal Code.

(2) imposition of the aggravated term for firearm use was not supported by the evidence, was an impermissible dual use of facts and was an abuse of discretion; and (3) additional presentence conduct credits must be awarded. We shall affirm.

FACTS AND PROCEDURAL HISTORY

We recite the facts in support of the judgment.

For about seven years, defendant and her three children lived with her boyfriend, Charles Shipley. Defendant and Shipley had a number of handguns, kept in a gun cabinet. Both engaged in recreational shooting. Defendant had shot her .357 magnum revolver more than 100 times. Defendant shot Shipley on September 20, 1999.

A week or two before Shipley was shot, defendant's son, J., had been in an altercation with other boys. Several boys had come to Shipley's house to see J. Shipley threatened the boys with a handgun. One of the boys then threatened to kill Shipley, which angered Shipley. Shipley was often angry with J., questioning his manhood and calling him derogatory names.

On Sunday, September 19, 1999, defendant returned home in the evening with her children. Shipley was angry at defendant for not doing enough about the boys who had gotten in the altercation with J. and had threatened Shipley. Defendant and Shipley quarreled, and he threw the kitchen telephone into the living room. Shipley told defendant to pack and leave. He threw other telephones. Shipley talked to defendant's mother on the telephone for several hours, but her mother was unable to calm him down. Defendant believed Shipley was carrying a gun.

Meanwhile, defendant had the children pack up their backpacks and school clothes. Defendant packed several boxes of her belongings and took her guns from the gun cabinet. Defendant put her handguns in her bedroom.²

About 1:30 a.m., after the children were in bed, defendant tried to calm Shipley down. When she tried to hug Shipley, he squeezed her hard and hurt her. She told him she was going to bed. Defendant took her .357 magnum revolver from the bedroom drawer, went into the bathroom, unlocked the gun, and loaded it with Blazer hollow point bullets. She stayed in the bathroom about five minutes. Shipley pounded on the door.

Defendant walked through the house calling Shipley's name. In the living room, she raised the gun at Shipley, saying she could not take any more. Defendant did not know how the gun went off, but maintained that it was an accident. Defendant told the police it was not self-defense. Defendant did not remember cocking the gun or pulling the trigger.

Defendant gave a number of statements to the police, and participated in a videotaped reenactment of the shooting with the county's forensic pathologist and detectives. During the reenactment, defendant told the police Shipley had been lying on the couch when she shot him. At trial, defendant testified

² In addition to the Smith & Wesson .357 magnum revolver found in the living room, the police found a loaded .9 mm automatic in a black sock, a .22-caliber handgun, and a .40-caliber Taurus handgun in defendant's nightstand. Defendant testified she had taken Shipley's .9 mm handgun from him after she shot him, at his request.

Shipley was standing, moving toward her, and that she was lowering the gun when it went off.

Expert testimony established that Shipley had been shot with a hollow point bullet from the .357 magnum, from less than 10 feet away. The forensic pathologist testified that the bullet entered Shipley's chest just below and inside the right nipple, passed in a straight line through the seventh rib and the liver, and came to rest in the first vertebra in the small of Shipley's back. Such a trajectory would be caused by a height advantage for the shooter, with the victim on his knees, or the victim lying flat on a couch or bed, or the victim bent over.

The jury acquitted defendant of first and second degree murder and voluntary manslaughter, finding her guilty of involuntary manslaughter with use of a firearm.

At sentencing, defendant produced a number of witnesses and provided the court with numerous letters of reference. Defendant produced her own privately prepared probation report and psychological evaluations.

The trial court noted factors in mitigation of the manslaughter, including the defendant's lack of prior record and the "great provocation" of domestic quarreling. As an aggravating factor, the court noted the vulnerability of the victim because he was unarmed and had an injury from recent surgery. The court found that proper balancing of the factors required imposition of the middle term.

The trial court conducted the same analysis on the firearm enhancement. The trial court noted that use of a firearm encompasses conduct ranging from simply flashing a gun to firing it. The trial court recounted the facts taken from defendant's own testimony, that she purposely took the firearm from a case, purposely unlocked it, and purposely placed six shells into the gun. Defendant then traveled throughout the house, pointing and displaying the gun which was, in all likelihood, already cocked. The court noted that expert testimony supported a finding that if the jury found that the gun went off accidentally, it must have been cocked because pressure was needed to pull the trigger if it was not cocked. Then, the court noted the children could easily have appeared when defendant was admittedly walking throughout the house with the gun ready to fire.

DISCUSSION

I

Defendant argues that imposition of a firearm use enhancement under section 12022.5, in addition to defendant's sentence for involuntary manslaughter, violates section 654's proscription on multiple punishment because the manslaughter conviction was based upon defendant's act of brandishing a firearm.³ Defendant is mistaken.

³ As given in this case, CALJIC No. 8.45 provided:

"Every person who unlawfully kills a human being without malice aforethought and without an intent to kill is guilty of the crime of involuntary manslaughter in violation of Penal Code [s]ection 192[, subdivision] (b). A killing is unlawful within the meaning of this instruction if it occurred during the

We recognize, as do both parties, that the Supreme Court has not directly reached the question of whether section 654 can apply to an enhancement that results from the same act as the underlying conviction.⁴ In *People v. Read*, the Court of Appeal held that section 654 did not bar the imposition of a firearm use enhancement under section 12022.5 when one of the theories used to convict defendant was that he threatened the victim with a gun, resulting in his conviction for involuntary manslaughter.⁵ In *Read*, defendant assumed if he had been prosecuted solely on the misdemeanor-manslaughter theory, firearm use would be treated as an element of the offense and enhancement would be barred.⁶ The Court of Appeal disagreed, pointing to

commission of an unlawful act not amounting to a felony which is dangerous to human life under the circumstances of its commission or in the commission of an act ordinarily lawful which involves a high degree of risk or death or great bodily harm without due caution and circumspection. The unlawful act constitutes a violation of Penal Code Section 417 which I'm going to read to you momentarily. The commission of unlawful acts without due caution and circumspection would necessarily be an act that was dangerous to human life in its commission.

"In order to prove this crime each of the following elements must be proved. Number one, a human being was killed. And, number two, the killing was unlawful."

⁴ Section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

⁵ *People v. Read* (1983) 142 Cal.App.3d 900, 902-903 (*Read*).

⁶ *Read, supra*, 142 Cal.App.3d at page 906.

the history underlying the Legislature's strong position discouraging the use of firearms, concluding the only bar against imposition of a weapons use enhancement was when use of a weapon was an abstract element of the crime.⁷ Use of a firearm is not an element of involuntary manslaughter. Viewing the language of section 12022.5 in light of its legislative history, we find that the enhancement was intended to apply to the offense of involuntary manslaughter as well as to voluntary manslaughter or murder.⁸ More recent case law supports the principles in *Read*.

In *People v. Myers*, the Court of Appeal found section 654 inapplicable to an enhancement under section 12022.55 for discharging a gun from a moving vehicle in a murder case based on the discharge of a gun from a car.⁹ The court explained that the extinction of the victim's life was the crime, and the use of the firearm only the method to achieve it.¹⁰ Similarly, in

⁷ *Read, supra*, 142 Cal.App.3d at pages 904-905. Section 12022.5, subdivision (a)(1) provides, in pertinent part, that "any person who personally uses a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of the offense of which he or she was convicted."

⁸ *Read, supra*, 142 Cal.App.3d at page 906.

⁹ *People v. Myers* (1997) 59 Cal.App.4th 1523, 1531-1534 (*Myers*).

¹⁰ *Myers, supra*, 59 Cal.App.4th at pages 1533-1534.

People v. Hutchins,¹¹ the Court of Appeal found section 654 inapplicable to the imposition of a firearm use enhancement under section 12022.53, subdivision (b) in addition to a sentence for second degree murder.¹² The court held section 654 inapplicable to the manner of commission of the homicide.¹³ We conclude that the reasoning in these cases is persuasive and apply it here.

Because we conclude that section 654 was inapplicable to the firearm use enhancement imposed under section 12022.5, we need not reach defendant's argument that a section 654 stay of the enhancement would make her eligible for more than 15 percent good time/work credit under section 2933.1. Defendant remains squarely within the ambit of section 2933.1 because she was convicted of using a firearm pursuant to section 12022.5, a crime specified in section 667.5, subdivision (c)(8).

II

Defendant contends that the trial court's imposition of the 10-year upper term for the firearm enhancement was error based on a dual use of facts, and an unsupported conclusion that defendant's conduct with a loaded gun endangered her children. Defendant argues that the court abused its discretion in imposing the upper term. We conclude defendant has failed

¹¹ *People v. Hutchins* (2001) 90 Cal.App.4th 1308 (*Hutchins*).

¹² *Hutchins, supra*, 90 Cal.App.4th at page 1315.

¹³ *Hutchins, supra*, 90 Cal.App.4th at page 1313.

to preserve these issues for appeal. In any event, we find no error.

Defendant failed to object to the court's sentencing choices in the trial court. In order to preserve the argument for appeal, a defendant must challenge the court's use of reasons, use of duplicate facts, or exercise of discretion in the trial court.¹⁴ In *People v. de Soto*, the Court of Appeal held that an objection to the prohibited dual use of an element of the offense as the basis for an aggravated term must be made at the time of sentencing.¹⁵

Contrary to defendant's contention, the failure to state adequate reasons or use of improper reasons for a sentencing decision is not jurisdictional error.¹⁶

Defendant's failure to object cannot be ignored. Defendant was on notice of prospective aggravating factors throughout the lengthy time delay in preparation for the sentencing hearing. The probation report itself listed each factor in mitigation ultimately relied upon by the trial court. It was filed September 14, 2000, nearly two months before the sentencing hearing on November 8, 2000. The sentence imposed was precisely that recommended by the probation officer. Defendant thus had

¹⁴ *People v. Scott* (1994) 9 Cal.4th 331, 352-356 (*Scott*).

¹⁵ *People v. de Soto* (1997) 54 Cal.App.4th 1, 7-9.

¹⁶ *Scott, supra*, 9 Cal.4th at pages 354-355; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1041-1042 (*Brown*).

ample opportunity to object to sentencing factors and proffer her own arguments.

Notwithstanding the waiver issue, we conclude no error occurred. Only a single valid aggravating factor is needed to support imposition of the upper term.¹⁷ Despite defendant's lack of intent to kill the victim, the uncontroverted evidence before the trial court of her preparation of the gun and her dangerous conduct with the loaded gun was more than required for simple gun use. We find no dual use of facts, and the reasons set forth by the trial court were supported by the evidence.

Defendant's contention that the imposition of the upper term was an abuse of discretion is also without merit. Sentencing discretion will not be disturbed on appeal unless it is arbitrary and irrational.¹⁸ The court is presumed to have considered all the appropriate mitigating factors. Indeed, the court listed a number of factors, which it used to balance out the aggravating factors on the underlying killing. Defendant's argument is no more than an attempt to seek a de novo determination and reweighing of sentencing factors. The record shows a careful evaluating of aggravating and mitigating factors, relevant both to the defendant and the offense. The fact that the trial court evaluated both aggravating and mitigating factors, and concluded the upper term was warranted on the enhancement while the middle term was appropriate to

¹⁷ *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360.

¹⁸ *People v. Welch* (1993) 5 Cal.4th 228, 234.

the principal term does not mean the trial court abused its discretion.¹⁹

DISPOSITION

The judgment is affirmed.

DAVIS, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.

¹⁹ *Brown, supra*, 83 Cal.App.4th at page 1046.